IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY I. GAYNOR	:	CIVIL ACTION
	:	
v.	:	
	:	
BETH NELOWET ET AL.	:	No. 99-6413

MEMORANDUM

Ludwig, J. April 19, 2000

Defendants Beth Nelowet, Donald B. Nelowet, Samuel Trueblood and Janet Amacher, Bernard McLafferty, Sarah[1] Long, and Stanley R. Ott[2] move to dismiss plaintiff Jeffrey I. Gaynor's pro se complaint or, in the alternative, for summary judgment.[3] Fed. R. Civ. P. 12(b)(1), (6), 56. Upon consideration of the

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[1] The proper spelling appear to be Sara. Def. Long's mem. at 1.

[2] Defendants Beth and Donald B. Nelowet submitted a joint motion, as did Samuel Trueblood and Janet Amacher. The remaining defendants submitted individual motions.

[3] Procedurally, the motions will be considered as motions to dismiss despite the submission of matters outside the complaint. Fed. R. Civ. P. 12(c), 56. Defendants proffered a settlement agreement and copies of orders filed in the estates. Defs. Beth and Donald B. Nelowet's mem., exs. A, B. The complaint included 13 exhibits that relate to the administration of the estates. Within the purview of a motion to dismiss, in addition to the allegations in the complaint, are attached exhibits, matters of public record, and "a concededly authentic document upon which the complaint is based when the defendant attaches such a document to its motion to dismiss." Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993).

Under Fed. R. Civ. P. 12(b)(6), the complaint's allegations are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiffs, and dismissal is appropriate only if it appears that plaintiffs could prove no set of facts that would entitle them to relief. See Port Authority of New York and New Jersey v. Arcadian Corp., No. 98-5045, 1999 WL 624590, at *4 (3d Cir. Aug. 18, 1999). In contrast, under Fed. R. Civ. P. 12(b)(1) attacking subject matter jurisdiction, "no presumptive truthfulness

(continued...)

motions, the action will be dismissed. Jurisdiction is federal question. 28 U.S.C. § 1331.

On December 16, 1999, plaintiff filed a complaint under 18 U.S.C. § 1961 (RICO) alleging that the amounts charged for commissions and attorney's fees in the administration of his parents' decedent estates were excessive.[4] The estates were administered in the Court of Common Pleas of Montgomery County, Orphans' Court Division. Estate of Simon Gaynor, Dec'd, No. 97-1315, and Estate of Mary Gaynor, Dec'd, No. 94-1238, Montgomery Co. Ct. of Common Pleas, (Pa.), Orphans' Ct. Div. The essence of the complaint is that defendants — as individuals, attorneys, and elected and appointed officials — ran a "La Cosa Nostra"[5] scheme "to defraud, harm, steal, threaten, extort and defraud proceeds due Plaintiff . . . ." Complt. at ¶ 1. The relief requested is $4,200,000 in compensatory and in punitive damages. Complt. at 21–22.

Defendant Ott, a judge of the Montgomery County Court of Common Pleas, must be dismissed as a party because of judicial immunity. See Mireles v.

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[3](...continued)
attaches to plaintiff's allegations" — "the trial court's jurisdiction is at issue," and plaintiff has the burden to prove that jurisdiction does exist. Mortenson v. First Federal Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977); see Anjelino v. The New York Times Co., 200 F.3d 73, 87 (3d Cir. 1999).

[4] The total amount set forth in the complaint was $200,000 — "looted" from the estates' assets. Complt. at 3, 15.

[5] "La Cosa Nostra" refers to "what is known to the general public in the United States [as] 'the Mafia.'" United States v. Tocco, 200 F.3d 401, 410 (6th Cir. 2000).

Waco, 502 U.S. 9, 11, 112 S. Ct. 286, 288, 116 L. Ed.2d 9 (1991) ("[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages."); Pierson v. Ray, 386 U.S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed.2d 288 (1967) ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly.").[6] At all relevant times, Judge Ott was acting within his judicial capacity and within his jurisdiction. Likewise, defendant Sara Long, the then Register of Wills of Montgomery County, was performing acts within her jurisdiction under 20 Pa. C.S. § 901.[7] "The Register of Wills is a judicial officer" entitled to "absolute immunity for performance of . . . judicial acts." Retail Clerks Int'l Ass'n v. Leonard, 450 F. Supp. 663, 666 (E.D. Pa. 1978) (citing Pa. Const. Sched. Art. V, § 16(n)). See also Digianvittorio v. D'Antonio, Civ. A. No. 96-6781, 1997 WL 13681, at *3 (E.D. Pa. Jan. 13, 1997). Defendant Long is immune from

[6] There are narrow exceptions to judicial immunity from suit for money damages — "a judge's 'immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial acts, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.'" Figuero v. Blackburn, No. 99-5252, 2000 WL 340794, at *6 (3d Cir. Mar. 27, 2000)(quoting Mireles v. Waco, 502 U.S. 9, 11–12, 112 S. Ct. 286, 288, 116 L. Ed.2d 9 (1991)). Mireles went on to clarify: "a judge is not absolutely immune from criminal liability, Ex parte Virginia, 100 U.S. 339, 348–49, 25 L. Ed. 676 (1880), or from a suit for prospective injunctive relief, Pulliam v. Allen, 466 U.S. 522, 536–43, 104 S. Ct. 1970, 1977–82, 80 L. Ed.2d 565 (1984)." Mireles v. Waco, 502 U.S. at 9 n.1, 112 S. Ct. at 287 n.1. No exception applies in this case.

[7] She no longer is Register of Wills. Def. Long's mem. at 1.

suit for the performance of her judicial duties[8] as Register of Wills and must also be dismissed. Civil immunity for judicial acts, however egregious the impropriety, is a bedrock principle of judicial independence. See Bradley v. Fisher, 80 U.S. (13 Wall) 335, 347, 20 L. Ed. 646 (1871).[9] The obvious alternative would be for judges to spend much of their time and energy defending themselves in retaliatory and vindictive lawsuits. No judicial system could operate in that manner. Almost every case results in a disappointed and often bitter litigant.

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[8] According to the complaint, defendants Long and McLafferty, "ignored breaches of law; overlooked false filings, false swearings; lies, theft, and omissions by [defendants] Trueblood, Amacher, and Nelowet." Complt. at ¶ 22.

[9] As the Court stated in Bradley:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.

Bradley v. Fisher, 80 U.S. (13 Wall) 335, 347, 20 L. Ed. 646 (1871).

The other defendants, Beth Nelowet and Donald B. Nelowet,[10] Samuel Trueblood, Janet Amacher,[11] and Bernard McLafferty[12] urge dismissal for lack of subject matter jurisdiction. They cite the Rooker-Feldman doctrine,[13] under which federal district courts are not permitted to exercise judicial review over state court proceedings. "District courts lack subject matter jurisdiction once a state court has adjudicated an issue because Congress has conferred only original jurisdiction not appellate jurisdiction on the district courts." Guarino v. Larsen, 11 F.3d 1151, 1156–57 (3d Cir. 1993); see also Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 24, 107 S. Ct. 1519, 1533, 95 L. Ed.2d 1 (1987)(Marshall, J., concurring) ("It is a well-settled principle that federal appellate review of judgments rendered by state courts can only occur in this Court, on appeal or by writ of certiorari."). A federal proceeding is barred under the Rooker-Feldman doctrine "when

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[10] Beth Nelowet is plaintiff's sister and executrix and beneficiary of the estate of their father, and successor trustee of their mother's non-marital trust. Complt. at exs. 4, 11.

[11] Defendants Trueblood and Amacher are attorneys who represented the estates.

[12] Defendant McLafferty was the solicitor to the Register of Wills and is now acting Register of Wills of Montgomery County. Complt. at ¶ 10.

[13] The "Rooker-Feldman" doctrine is derived from two U.S. Supreme Court decisions: Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 n.16, 103 S. Ct. 1303, 1315 n.16, 75 L. Ed.2d 206 (1983). See ASARCO Inc. v. Kadish, 490 U.S. 605, 622, 109 S. Ct. 2037, 104 L. Ed.2d 696 (1989) ("The Rooker-Feldman doctrine interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in [the Supreme Court].").

entertaining the federal court claim would be the equivalent of an appellate review of [the state court] order." FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996). Rooker-Feldman applies to final state court judgments, Port Authority Police Benevolent Ass'n v. Port Authority, 973 F.2d 169, 177 (3d Cir. 1992), including those of lower state courts. Id. ("[F]ederal district courts are certainly . . . precluded from reviewing decisions of lower state courts, which are subject to correction and modification within the state court system.").

The present complaint can be summarized in the following paragraph:

> Every action, every inaction, every ruling, every false accounting, every denial, every Petition marked as unintelligible or improper, every theft, every omission, every misleading filing and statement, every dilatory action and inaction, every avenue to allow the continued financial rape of the estates and trust were thrust against plaintiff . . . solely to rob him . . . .

Complt. at ¶ 79. In effect, plaintiff takes exception to the entire administration of his parents' estates, which necessarily included the Orphans' Court's oversight and approvals of their administration.[14] To consider granting the requested relief would be tantamount to acting as an appellate court, which, under the Rooker-Feldman doctrine, this court has no authority to do.

In Shepherdson v. Nigro, 5 F. Supp.2d 305, 307–08 (E.D. Pa. 1998), a state court judge was accused of having violated plaintiff's constitutional due

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[14] Judge Ott confirmed the accounts, together with the awards of commissions and attorney's fees — and, in addition, denied plaintiff's request to rescind the settlement agreement with his sister, her husband, and the attorneys that allocated legal fees and commissions. Defs. Beth and Donald B. Nelowet's mem. at ex. A, B (order, Jan. 5, 2000).

process rights by not recusing himself from a case in which the other party's law firm had contributed money to the judge's election campaign.[15] Applying Rooker-Feldman, Shepherdson considered whether plaintiff had presented a claim "independent of the merits of the [state court] decision" that would not be jurisdictionally barred. It concluded that "federal relief premised on a finding that a state court judgment was entered in violation of the constitutional right to due process would impair that judgment, if not literally render it ineffectual." Id. Shepherdson's rationale is apposite: "[t]o establish injury, . . . the plaintiff would have to show that the violation of such an independent right caused an erroneous adverse decision to be made and this is precluded by the Rooker-Feldman doctrine." Id. (citing Nesses v. Shepard, 68 F.3d 1003, 1005 (7th Cir. 1995)).

The proper method to challenge the order or ruling of a court is to appeal to the appellate courts within the same judicial system. Even in circumstances in which the great writ of habeas corpus may be used to test the legality of state proceedings in federal court, the petitioner must demonstrate that the judicial process has been exhausted.[16] See O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 1731, 144 L. Ed.2d 1 (1999) ("Before a federal court

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[15] Attached to the present complaint are motions and orders relating to plaintiff's unsuccessful attempts to have Judge Ott recused. Plaintiff's response to defendants' motions states that he has appealed to the Pennsylvania Superior Court Judge Ott's denial of the recusal motions. Pltf.'s supp. answer to all defs., docket no. 32, at 3.

[16] Here, whether or not plaintiff has appealed — other than to have the judge recused, see n.14, supra — is not disclosed.

may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court."); Johnson v. Rosemayer, 117 F.3d 107 (3d Cir. 1997) (similarities in Rooker-Feldman doctrine and habeas review — "federal court in a habeas corpus case [is] most circumspect in re-examining state court decisions.").

Rooker-Feldman aside, the complaint itself is fundamentally deficient as an attempt to state a civil RICO cause of action. "To survive a motion to dismiss, the complaint must allege: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'"[17] DeMauro v. DeMauro, No. 99-1589, 2000 WL 231255, at *2 (1st Cir. Feb. 16, 2000)(citing Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985)). The complaint avers a conspiracy among the defendants to "rob" plaintiff via the imposition of large attorney's fees and commissions.[18] Complt. at 3. In response to defendants' motions, plaintiff sought

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[17] The RICO statute defines "racketeering activity" to include, inter alia,

> any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . , which is chargeable under State law and punishable by imprisonment for more than one year . . . .

18 U.S.C. § 1961(1)(A). The definition also includes wire fraud (18 U.S.C. § 1343) and mail fraud (18 U.S.C. § 1341). Id. at (1)(B).

[18] "Theft" is not an enumerated RICO predicate act. Annulli v. Panikkar, 200 F.3d 189,199–200 n. 8 (3d Cir. 1999)(refusing to read "the state crime of theft, and its analogues, into [18 U.S.C.] § 1961's expansive list" because the "list of acts constituting predicate acts of racketeering activity is exhaustive.").

to rectify the complaint by stating that the predicate RICO acts consist of wire and mail fraud.[19] 18 U.S.C. § 1961(1)(B).

There are numerous insufficiencies.[20] The complaint does not make out a RICO enterprise[21] but instead presents an assortment of individuals. "A RICO enterprise is 'an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.'" United States v. Torres, 191 F.3d 799, 805 (7th Cir. 1999)(quoting Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 644 (7th Cir.1995)). The Nelowet defendants are not alleged to be a part of a continuing enterprise — Beth Nelowet is sued in her role as executrix of her father's estate

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[19] For wire or mail fraud, proof is required of "a scheme to defraud and a mailing or wire in furtherance of that scheme." Annulli v. Panikkar, 200 F.3d 189, 200 n.9 (3d Cir. 1999)(quoting Greenberg v. Tomlin, 816 F. Supp. 1039, 1049 (E.D. Pa. 1993)).

[20] The complaint does not state which part of the RICO statute was violated. Reading the pro se complaint liberally, it appears to assert a claim under 18 U.S.C. § 1962(d) — "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." Generally, the other provisions proscribe: using the proceeds from racketeering activity for the benefit of an enterprise engaged in interstate commerce, 18 U.S.C. § 1962(a); acquiring or maintaining an interest in an enterprise through a pattern of racketeering, 18 U.S.C. § 1962(b); and being employed by or associated with an enterprise that engages in racketeering activity, 18 U.S.C. § 1962(c). The complaint can best be categorized as setting forth a conspiracy to violate subsection (c) — an association engaging in racketeering activities to harm plaintiff.

[21] "Enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961 (4). See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc., 46 F.3d 258, 262 (3d Cir. 1995).

and administratrix of a non-marital trust; there are no separate predicate acts attributed to Donald B. Nelowet. Defendants Trueblood and Amacher are accused of overcharging the estates for unnecessary legal work, with the support of the other defendants. This discrete conspiracy, purportedly organized to fleece plaintiff, does not measure up to the requisite "pattern of racketeering activity" proscribed by RICO. 18 U.S.C.A. §§ 1961(1), (5). See Kehr v. Fidelcor, Inc., 926 F.2d 1406, 1418 (3d Cir. 1991) (dismissing the RICO complaint because, among other deficiencies, "the allegations in the . . . complaint do not indicate the fraud was 'a regular way of doing business' for any defendant. Nor . . . does this case involve a 'long-term association that exists for criminal purposes.'")(quoting H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed.2d 195 (1989)). There is no pattern of racketeering activity or threat of future criminal activity alleged. Plaintiff, his sister, brother-in-law, and the attorneys had executed a final settlement agreement that excused the estates from payment of certain legal billings. Defs. Beth and Donald B. Nelowet's mem. at ex. A. See Lutin v. New Jersey Steel Corp., 122 F.3d 1056 (table), No. 96-9664, 1997 WL 447005, at *8 (2d Cir. 1997)(terminable scheme is not "criminal conduct [] accompanied by a threat of future harm."). As to defendant McLafferty, his connection to the supposed organization is unclear, even if the allegations as to the others were sufficient.

Predicate acts of wire and mail fraud must be pleaded with particularity, as required by Fed. R. Civ. P. 9(b). Rolo v. City Investing Co.

Liquidating Trust, 155 F.3d 644, 657–59 (3d Cir. 1998)(RICO predicate acts of wire and mail fraud fail particularity requirement if complaint "lacks any specific allegations about the [fraudulent] presentations made to any [] plaintiff[]."). While these defects may be correctable, plaintiff's request for permission to amend the complaint will be denied because wholesale amendment would be futile. Walton v. Mental Health Ass'n of Southeastern Pennsylvania, 168 F.3d 661, 665 (3d Cir. 1999). Given all the elements of this case, no version of the allegations would sustain a RICO cause of action. The complaint expresses plaintiff's sense of outrage and exasperation, but that is not enough. This is the wrong court in which to ask for relief, and RICO is not an appropriate remedy.

An order accompanies this memorandum.

Edmund V. Ludwig, J.

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O R D E R

AND NOW, this 18th day of April, 2000, the motions to dismiss of all defendants — Beth Nelowet, Donald B. Nelowet, Samuel Trueblood, Janet Amacher, Bernard McLafferty, Sara Long, and Stanley R. Ott — are granted, and the action is dismissed. Fed. R. Civ. P. 12(b)(1), (6). All other pending motions are denied as moot.

Edmund V. Ludwig, J.